APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/913,484	11/20/2001	Vasco Vollmer	10191/1963	2532

26646   7590   08/22/2008
KENYON & KENYON LLP
ONE BROADWAY
NEW YORK, NY 10004

EXAMINER
BATES, KEVIN T

ART UNIT	PAPER NUMBER
2153	

MAIL DATE	DELIVERY MODE
08/22/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

_____

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

_____

Ex parte VASCO VOLLMER and MARKUS RADIMIRSCH

_____

Appeal 2008-0464
Application 09/913,484
Technology Center 2100

_____

Decided: August 22, 2008

_____

Before JAMES D. THOMAS, HOWARD B. BLANKENSHIP,
and THU A. DANG, *Administrative Patent Judges*.

DANG, *Administrative Patent Judge*.

DECISION ON APPEAL

I. STATEMENT OF CASE

Appellants appeal the Examiner's final rejection of claims 13-25
under 35 U.S.C. § 134. We have jurisdiction under 35 U.S.C. § 6(b).

A. INVENTION

According to Appellants, the invention relates to a method of utilization of data packets of differing capacity transmitted between a master station and a plurality of subscribers in a communications system, and particularly, a master station for a communications system having frame-oriented transmission of data packets of differing capacity between the master station and a plurality of subscribers, as well as relating to a corresponding subscriber device (Spec. 1, ll. 2-10).

B. ILLUSTRATIVE CLAIM

Claim 13 is exemplary and is reproduced below:

13. A method of effective utilization of data packets of differing capacity, comprising:

exchanging user data packets and control data packets between a master station and subscribers, the user data packets having a data capacity which is a multiple of a data capacity of the control data packets;

filling at least some containers for the user data packets each with a plurality of control data packets in a transmission frame according to an agreement between the master station and at least one of the subscribers, the agreement stipulating which of the containers for the user data packets are filled with control data packets, the control data packets which are stored in the containers for the user data packets being combined in a subframe, an external format of the subframe being adapted to a format of the user data packets; and

2

transferring the user data packets and the control data packets between the master station and the subscribers in a communications system having frame-oriented transmission.

C. REJECTIONS

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Ketcham   US 6,721,334 B1   Apr. 13, 2004
                                                     (filed Feb. 18, 1999)

Claims 13-25 stand rejected under 35 U.S.C. § 102(e) over the teachings of Ketcham.

We affirm.

II. ISSUES

The issues are whether Appellants have shown that the Examiner erred in finding that claims 13-25 are unpatentable under 35 U.S.C. § 102(e) over the teachings of Ketcham, and in particular, that Ketcham discloses the claimed limitations of filling at least some containers for user data packets and stipulating which of the containers for the user data packets are filled with control data packets.

III. FINDINGS OF FACT

The following Findings of Fact (FF) are shown by a preponderance of the evidence.

Ketcham

1. Ketcham discloses packet aggregation in packet-based network, wherein an aggregate packet can include more than just two packets and typically no more than approximately four packets are embedded in a single aggregate packet (col. 2, ll. 61-67).

2. Aggregate payload 700 includes a payload flag 702, a count 704, a first entry 706, and nth entry 708, a first embedded packet 730, and an nth embedded packet 740. The embedded packet 730-740 are modified versions of packets that were aggregated to form the aggregate packet (col. 10, ll. 1-7; Fig. 7).

3. The embedded packets 730-740 can be the entire packets including all of the LLC components for both all of the packets. However, many packet based networks use LLC components that are identical across all packets and could be removed to decrease overhead and increase the amount of space available for embedded packets in the aggregate payload 700 (col. 10, ll. 30-39).

4. The method involves sending a probe packet to a network device. A timer is then set to wait for a response packet. If a response packet is returned before the timer expires, then the sender will record that the network device supports aggregate packets. Otherwise it is assumed that the network device does not support aggregate packets (col. 3, ll. 13-21).

PRINCIPLES OF LAW

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros., Inc. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987).

The *claims* measure the invention. *See SRI Int'l v. Matsushita Elec. Corp., of America*, 775 F.2d 1107, 1121 (Fed. Cir. 1985) (en banc). "[T]he PTO gives claims their 'broadest reasonable interpretation.'" *In re Bigio*, 381 F.3d 1320, 1324 (Fed. Cir. 2004) (quoting *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000)). "Moreover, limitations are not to be read into the claims from the specification." *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) (citing *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989)).

When descriptive material is not functionally related to the substrate, the descriptive material will not distinguish the invention from the prior art in terms of patentability. *See In re Ngai*, 367 F.3d 1336, 1339 (Fed. Cir. 2004). *Cf. In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983).

V. ANALYSIS

Appellants do not provide separate arguments with respect to the rejection of claims 13-25. Therefore, we select independent claim 13 as being representative of the cited claims. 37 C.F.R. § 41.37(c)(1)(vii).

As to claim 13, Appellants argue that Ketcham "has nothing to do with" the claimed feature of "filling at least some **containers for the user**

5

data packets each with **a plurality of control data packets** in a transmission frame" (App. Br. 6) but "merely provides for aggregating two or more individual packets 118-124 and transmitting the aggregate packet" (App. Br. 7). Appellants argue that "there is simply no tenable basis for the Examiner to assert that the claimed feature of 'filling at least **some** containers for the user data packets' is equivalent to merely '**filling at least some containers**'" (Reply Br. 3), and that "[b]y identifying **which containers normally assigned for user data packets are filled with control data packets**, it is ensured that control data packets contained in the containers for user data packets are properly interpreted as control data, and not as user data" (Reply Br. 3-4).

We begin our analysis by giving the claims their broadest reasonable interpretation. *See In re Bigio* at 1324. Furthermore, our analysis will not read limitations into the claims from the specification. *See In re Van Geuns* at 1184.

Appellants' argument that Ketcham does not disclose the claimed "filling at least some containers for the user data packets with a plurality of control data packets in a transmission frame" limitation because Ketcham merely teaches "filling at least some containers" is not commensurate with the invention that is claimed. That is, though Appellants appear to agree with the Examiner that Ketcham discloses "filling at least some containers," Appellants appear to be arguing that Ketcham does not disclose containers *normally assigned only* for user data packets. Such *normally assigned only*

for user data packets limitation cannot be read into the claims and such argument is not commensurate with the claimed invention. Accordingly, the issue is whether Ketcham discloses the claimed limitation of filling at least some containers for user data packets.

　　　　We agree with the Examiner's finding that Ketcham discloses the claimed elements on appeal beginning at page 3 of the Answer, and the Examiner's corresponding responsive arguments beginning at page 8 of the Answer. Ketcham discloses filling an aggregated packet with a plurality of data packets (FF 1-3).   As agreed by the Appellants, such teachings of Ketcham includes "filling at least some containers" with data packets (Reply Br. 3). As the Examiner found, the aggregated packet being sent over the network "includes the user data packets (audio, video and data packets) and the control packets" and "the aggregate packets can contain a plurality of control packets" (Ans. 9).

　　　　We agree that the aggregated packet containing user data packets (as well as control data packets) is a container for user data packets, and that such aggregated packet is filled with a plurality of control packets (as well as user data packets). We thus agree with the Examiner that the filling at least some containers step, as taught by Ketcham, is a step of filling at least some containers for user data packets with a plurality of control data packets, as recited in claim 13.

Additionally, we note that the feature "user" or "control" in "user data packet" and "control data packet" is nonfunctional descriptive material that is not functionally related to the step of "filling at least some containers." Such "user data packet" or "control data packet" feature does not change the functionality of or provide an additional step to the "filling at least some containers" step of the claimed method, but rather, is a label set forth to indicate that the data packets are not the same. Though Appellants argue that the definitions of "user data packet" and "control data packet" must be "**consistent with the specification and the interpretation that those skilled in the art would reach**," (App. Br. 8) when the descriptive material is not functionally related to the claimed step, the descriptive material will not distinguish the invention from the prior art in terms of patentability. See *In re Ngai* at 1339 and *In re Gulack* at 1385. Accordingly, we find that Ketcham discloses at least the recited step of "filling at least some containers" and the feature "user data packet" or "control data packet" does not distinguish the claims from Ketcham in terms of patentability.

The Appellants also argue that the filling step of Ketcham is not performed "**according to an agreement between the master station and at least one of the subscribers**, the **agreement stipulating which of the containers for the user data packets are filled with control data packets**" (App. Br. 8). Appellants argue that, instead, "Ketcham deals with 'determining which of the network devices on that route support <u>packet</u>

<u>aggregation</u>" (App. Br. 10). The issue is whether Ketcham discloses an
agreement stipulating which of the containers for the user data packets are
filled with control data packets.

We agree with the Examiner's finding that Ketcham discloses the
claimed elements on appeal beginning at page 3 of the Answer, and the
Examiner's corresponding responsive arguments beginning at page 10 of the
Answer. Ketcham discloses determining which network device supports
packet aggregations, and thus, which data packet sent over the network is an
aggregated packet (FF 4). The Examiner found that "[b]y being able to
support packets, the second router agreed that it can receive packets that
contain aggregated control data packets" and that the "aggregated packets
are the only packets which can contain a plurality of packets and a plurality
of control packets" (Ans. 11).

We agree that, in determining which packets are aggregated packets,
Ketcham discloses which containers are filled with an aggregation of
packets (including a plurality of control data packets). We thus agree with
the Examiner that the determination as to which containers are filled with an
aggregation of control data packets (as well as user data packets), as taught
by Ketcham, is an agreement stipulating which of the containers for the user
data packets are filled with control data packets, as recited in claim 13.

In the Reply Brief, Appellants add the argument that "[e]ven if one
assumed for the sake of argument that an aggregate packet did contain a
control data packet, a <u>mere understanding with respect to the capability</u> to

support aggregate packets provides <u>no indication</u> <u>whether an aggregate</u> <u>packet actually contains a control data packet</u>" (Reply Br. 6). However, such argument is not commensurate with the invention that is claimed. That is, though Appellants appear to concede that Ketcham discloses determining which of the containers for the user data packets are aggregated packets, Appellants appear to be arguing that Ketcham does not disclose *only* determining the containers filled with control data packets. Such *only* limitation cannot be read into the claims and such argument is not commensurate with the claimed invention.

As discussed above, we agree that Ketcham discloses determining which packets are aggregated packets filled with a plurality of data packets, including user data packets and control data packets. We thus agree with the Examiner that Ketcham discloses an agreement stipulating which of the containers for the user data packets are filled with control data packets (as well as user data packets), as recited in claim 13.

Furthermore, as discussed above, the feature "control" in "control data packet" is nonfunctional descriptive material that is not functionally related to the step of "filling" the containers, since such "control data packet" feature does not change the functionality of or provide an additional step to the "filling" step. Such descriptive material will not distinguish the invention from the prior art in terms of patentability. Accordingly, we find that Ketcham discloses determining which containers are filled with

aggregated data packets, and the feature "control data packet" does not distinguish the claims from Ketcham in terms of patentability.

The Appellants also argue that "there is simply no suggestion in Ketcham that any '**control data packets** which are stored in the containers for the user data packets' are '**combined in a subframe**,' let alone that '**an external format of the subframe [is] adapted to a format of the user data packets**" (App. Br. 11). However, the Examiner found that Ketcham discloses such limitations (Ans. 3 and 12). In response, Appellants provide no argument to dispute that the Examiner has correctly shown where all these claimed elements appear in the prior art.

Accordingly, we conclude that Ketcham discloses the claimed limitations of filling at least some containers for user data packets and stipulating which of the containers for the user data packets are filled with control data packets, and that Appellants have not shown that the Examiner erred in rejecting claim 13 and claims 14-25 falling with claim 13 under 35 U.S.C. § 102(e).

CONCLUSIONS OF LAW

(1) Appellants have not shown that the Examiner erred in finding that claims 13-25 are unpatentable over the teachings of Ketcham.

(2) Claims 13-25 are not patentable.

DECISION

The Examiner's rejection of claims 13-25 under 35 U.S.C. §102(e) is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

pgc

KENYON & KENYON LLP
ONE BROADWAY
NEW YORK NY 10004